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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH and HUMAN SERVICES, PETITIONER

v.

MARIO LOPEZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the district court had jurisdiction over the claims of class members who received adverse administrative decisions under Title II or Title XVI of the Social Security Act more than 60 days before this suit was filed, but who did not seek review of those decisions within the 60 days allowed under the Act and implementing regulations.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services. The respondents consist of the following groups of plaintiffs in district court:

1. Twenty individuals were named as plaintiffs in the complaint: Mario Lopez, Wallace Dorsey, Joel Tapia, Louis Ortiz, Marilyn Cropper, Carl Smith, James Board, Mary R. Diaz, Richard N. Alton, Lloyd R. Hittle, Ouida Brown, Irvin Evans, Trinidad Lopez, Elizabeth Holmes, Emma Kelly, Kimberly Bailey, Marvin Robert White, Wendy Fumi Murakami, Freddy Rose, and David Valenzuela.

2. Fourteen organizations were named as plaintiffs in the complaint: People First of California, Inc., People United for Self Help, Inc., Disabled Rights Union, Los Angeles Network Against Psychiatric Assault, Alliance of Social Security Disability Recipients, Humboldt Access Project, Adult Independence Development Center, California Association for Physically Handicapped (Independent Living Center), Center for Independent Living for San Gabriel Valley, Rolling Start, South East Center for Independent Living, Consortium of Independent Living Centers, Senior Political Action Federation, and California Association of the Physically Handicapped.

3. The district court certified a class of plaintiffs consisting of (App., *infra*, 99a):

> all persons who live within [the Ninth Circuit], who (a) receive or received Supplemental Security Income Disability benefits or Social Security disability insurance benefits and have been or will be considered for termination after August 30, 1981, or (b) receive or received Supplemental Security Income disability benefits under the "grandfather clause" of the Social Security Act, 42 U.S.C. § 1382c(a)(3)(E), and have been or will be considered for termination after August 25, 1980, such consideration being or having been for the asserted reason that the claimant's disability had ceased.

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No.

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v.

MARIO LOPEZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The February 22, 1984 opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 725 F.2d 1489, and the August 24, 1983 opinion of the court of appeals denying the Secretary's application for a stay pending appeal (App., *infra*, 47a-66a) is reported at 713 F.2d 1432. The August 18, 1983 order of the court of appeals denying the Secretary's emergency motion for a stay pending appeal (App., *infra*, 67a-72a) is unreported. The district court's order dated June 16, 1983 (App., *infra*, 84a-93a) is reported at 572 F. Supp. 26. The district court's memorandum of decision dated June 16, 1983 (App., *infra*, 73a-83a), its memorandum of decision dated July 27, 1983 (App., *infra*, 94a-97a), and its order dated August 4, 1983, amending the June 16, 1983 memorandum of decision and order (App., *infra*, 98a-100a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1984 (App., *infra*, 1a), and the order of the court of appeals directing that no petition for rehearing or rehearing en banc would be entertained by the panel was entered on the same date (App., *infra*, 46a). By order dated May 15, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including June 29, 1984, and by order dated June 21, 1984, Justice Rehnquist further extended the time within which to file the petition to and including July 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. 1331 and 1361; Sections 205(a), (b), (g) and (h), 221(a) and (d), and 1631(c) and (d)(1) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405(a), (b), (g) and (h), 421(a) and (d), and 1383(c) and (d)(1); and relevant provisions of the procedural regulations for processing claims for disability and other benefits under Title II of the Social Security Act, 42 U.S.C. (& Supp. V) 401 *et seq.*, 20 C.F.R. Pt. 404, Subpt. J, are reproduced at App., *infra*, 110a-123a.

STATEMENT

On the merits, this class action concerns the evidentiary principles applied by the Secretary of Health and Human Services in determining whether a recipient of disability benefits under Title II or Title XVI of the Social Security Act (42 U.S.C. (& Supp. V) 401 *et seq.*, 1381 *et seq.*) continues to be entitled to receive benefits. However, the merits of the case are not now before the

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[1] The regulations governing the processing of claims for disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act (20 C.F.R. Pt. 416, Subpt. N) are essentially identical to those applicable to Title II claims and therefore are not separately set out in the Appendix.

Court. In this Petition, we seek review of the judgment of the court of appeals insofar as it affirms the district court's exercise of jurisdiction with respect to certain of the class members. Specifically, we submit that the district court erred in ordering the Secretary to reopen thousands of administrative decisions terminating disability benefits that had become final and binding before this suit was filed when the claimants failed to seek further review of those decisions within the 60-day period allowed by the Social Security Act and implementing regulations. The rulings of this Court leave no doubt that the courts below lacked authority to resurrect these stale claims.

A. The Statutory And Regulatory Framework

1. Titles II and XVI of the Social Security Act provide for the payment of disability benefits to a person who, because of a physical or mental impairment, is unable to do his previous work or to "engage in any * * * kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B). An individual who is found to be disabled thereafter may continue to receive benefits only for as long as his status continues to satisfy the statutory definition of disability. 42 U.S.C. (& Supp. V) 423(a)(1), 425; 20 C.F.R. 404.1594, 404.1597. Accordingly, Congress has provided for the Secretary, at least once every three years, to review the cases of individuals who previously were found to be disabled under Title II in order to ascertain whether they continue to be eligible for benefits. 42 U.S.C. (Supp. V) 421(h). The Secretary has provided for a parallel program of periodic review under the Title XVI Supplemental Security Income (SSI) program. When the individual's case is reviewed, he bears the burden of showing, "by means of 'medically acceptable clinical and laboratory diagnostic techniques,'" that he continues to have a physical or mental impairment of sufficient severity to satisfy the statutory standard of disability. *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976), quoting 42 U.S.C. 423(d)(3).

2. "To facilitate the orderly and sympathetic administration of the disability program[s] * * *, the Secretary and Congress have established an unusually protective * * * process for the review and adjudication of disputed claims." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 2.

a. The initial determination whether a person receiving benefits is still disabled ordinarily is made by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary, through the Social Security Administration (SSA). 42 U.S.C. (Supp. V) 421(a) and 42 U.S.C. 1383b(a); 20 C.F.R. 404.1503, 416.903. The individual first is notified that his case has been selected for review and is requested to furnish information about his current medical condition and the identity of his treating physician. 20 C.F.R. 404.1593, 416.993. If the state agency then makes a tentative determination that his disability has ceased, the individual is given an advance written notice and explanation and is informed that he has 10 days within which to submit any additional information. 20 C.F.R. 404.1594-404.1595, 416.994. After this 10-day period and the receipt of any further evidence, the state agency makes its initial determination. See *Mathews* v. *Eldridge*, 424 U.S. at 337-338.

b. If the state agency determines that an individual receiving Title II disability benefits no longer is disabled, he may request a de novo reconsideration. 20 C.F.R. 404.904, 404.907-404.921.[2] Governing regulations provide—and the individual is explicitly notified—that reconsideration must be requested within 60 days of his receipt of the adverse initial determination. The initial determination terminating benefits becomes binding upon the claimant if he does not request reconsideration within the stated time period. 20 C.F.R. 404.905, 404.909(a)(1). Although the individual may request that the

[2] Under amendments to the Act effective January 12, 1984, the individual must be afforded an opportunity for a face-to-face evidentiary hearing at the reconsideration stage. Pub. L. No. 97-455, § 4(a), 96 Stat. 2499, to be codified at 42 U.S.C. 405(b)(2).

60-day period for seeking further review at this or any other stage of the process be extended by SSA for good cause (see, *e.g.*, 20 C.F.R. 404.909(b)), the denial of such a request is not subject to administrative or judicial review. 20 C.F.R. 404.903(g), 416.1403(a)(8).

c. If the decision on reconsideration is adverse to the claimant, the next step in the administrative review process is an opportunity for an evidentiary hearing before an administrative law judge (ALJ) in SSA, as required by the Social Security Act itself. 42 U.S.C. (Supp. V) 421(d); 20 C.F.R. 404.944-404.965.[3] The Social Security Act provides that an individual must request an ALJ hearing within 60 days (42 U.S.C. (Supp. V) 405(b), 1383(c)(1)), and implementing regulations provide that the decision that his disability has ceased is binding unless he requests an ALJ hearing within that period. 20 C.F.R. 404.920(a), 404.921, 404.933(b), 416.1404(b)(3), 416.1405, 416.1409(a).

Because entitlement to SSI benefits is based on need (42 U.S.C. 1382(a)), the Secretary has implemented this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), by providing that payment of benefits under Title XVI will be continued, even after an adverse initial determination, until the ALJ has rendered his decision. 20 C.F.R. 416.1336(b). By contrast, this Court held in *Mathews* v. *Eldridge* that the Due Process Clause does not require the Secretary to continue payment of disability benefits under Title II, which are not based on need, until after the claimant has had an opportunity for an ALJ hearing. 424 U.S. at 339-349. However, Congress enacted temporary legislation in 1982 permitting the claimant in a Title II disability termination case to

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[3] The Secretary has omitted the reconsideration stage in SSI termination cases under Title XVI of the Act, and the SSI recipient therefore is entitled to the statutorily required ALJ hearing directly after receiving notice of an adverse initial determination. 42 U.S.C. (Supp. V) 1383(c)(1); 20 C.F.R. 416.1407, 416.1429-416.1465.

elect to receive interim benefits pending receipt of the ALJ's decision, subject to recoupment if the ALJ affirms the reconsideration decision that his disability has ceased.[4] Although this temporary authorization has expired, bills have passed both Houses of Congress at the time of the filing of this petition that would reinstitute the Title II interim benefits authorization.[5]

d. If the decision by the ALJ after a hearing is adverse to the claimant under either Title II or Title XVI, he then may seek review by the Appeals Council in SSA. 20 C.F.R. 404.967-404.983, 416.1467-416.1483. The regulations provide that if the claimant does not seek Appeals Council review within 60 days or such further period as the Secretary permits, the ALJ's decision is binding. 20 C.F.R. 404.955(a), 404.968(a)(1), 416.1455(a), 416-.1468.

e. Only after the Appeals Council has either denied review of the ALJ's decision, or has granted review and rendered its own decision on the merits, is the Secretary deemed to have rendered her "final decision" or "final determination" on the claim, which is then subject to judicial review in federal district court pursuant to 42 U.S.C. (Supp. V) 405(g). See 42 U.S.C. (Supp. V) 421(d) and 42 U.S.C. 1383(c)(3); 20 C.F.R. 404.900 (a)(5), 404.981, 416.1400(a)(5), 416.1481. The Act requires that judicial review be "commenced within sixty

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[4] Pub. L. No. 97-455, § 2, 96 Stat. 2498, to be codified at 42 U.S.C. 423(g). The temporary authorization (as briefly extended by Pub. L. No. 98-118, § 2, 97 Stat. 803) applies to any case in which the initial determination that the disability had ceased was made on or after (or was pending on administrative review on) the effective date of the Act (January 12, 1983), but before December 7, 1983. HHS was authorized to continue to pay benefits in such cases through June 1984 or until the ALJ rendered his decision, whichever occurred first.

[5] See Section 203 of H.R. 3755, 98th Cong., 2d Sess., as passed by the House of Representatives on March 27, 1984 (130 Cong. Rec. H1986 (daily ed.)), and Section 5 of H.R. 3755, 98th Cong., 2d Sess., as passed by the Senate on May 22, 1984 (130 Cong. Rec. S6203 (daily ed.)).

days after the mailing to [the claimant] of notice" of the final decision or final determination, "or within such further time as the Secretary may allow." 42 U.S.C. (Supp. V) 405(g). If judicial review is not sought within this time period, the Appeals Council's decision (or the ALJ's decision, if the Appeals Council denied review) is binding upon the claimant. 20 C.F.R. 404.981, 404.982, 416.1481, 416.1482.

f. Although, as we have seen, an adverse decision at any step of the administrative process becomes final and binding upon the claimant if he does not seek further review within the 60 days allowed, the Secretary has provided by regulation that such a decision may be reopened within 12 months for any reason, within two or four years for good cause, and at any time if the decision was obtained by fraud or similar fault. 20 C.F.R. 404.987, 404.988, 404.989, 416.1487, 416.1488, 416.1489. However, a denial of a request to reopen is not subject to administrative or judicial review. 20 C.F.R. 404.903(*l*), 416.1403(a)(5). See *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

B. The Proceedings in this Case

1. This action was filed in the United States District Court for the Central District of California on February 4, 1983, by 20 named disability claimants and 14 organizational plaintiffs. They contended that the Secretary may not terminate the payment of disability benefits under Title II and Title XVI of the Social Security Act to individuals who a state agency or SSA has determined are not currently disabled unless the state agency or SSA also produces evidence that the person's medical condition has improved over what it was when he was found to be disabled. Respondents maintained that the Secretary was required to adopt a "medical improvement" prerequisite to cessation of benefits under two decisions of the Ninth Circuit (*Finnegan* v. *Mathews*, 641 F.2d 1340 (1981), and *Patti* v. *Schweiker*, 669 F.2d 582 (1982)) and that the Secretary's failure to follow the result in those cases when reviewing claims of other individuals violated con-

stitutional principles of separation of powers and due process. E.R. 11-12, 17-20, 40-51.[6]

The *Finnegan* decision relied upon by respondents in the complaint was an action for judicial review under 42 U.S.C. 405(g) by a "grandfatheree" who had been transferred to the federal SSI rolls from a state public assistance plan when the SSI program was established in 1974. The Secretary terminated the individual's benefits on the ground that he was not disabled within the meaning of Title XVI of the Social Security Act. The Ninth Circuit held, however, that benefits could not be terminated absent proof of either a material improvement in the individual's medical condition demonstrating that he no longer is disabled within the meaning of the state statute or a showing of a clear and specific error during the prior state determination. 641 F.2d at 1344-1347. The court did not explain the basis of this conclusion, except to assert that a showing of medical improvement "logically" was necessary. *Id.* at 1345. The *Patti* decision relied upon by respondents in the complaint was an individual action under 42 U.S.C. 405(g) involving an SSI claimant who was not a "grandfatheree." The Ninth Circuit acknowledged in *Patti* that the claimant bears the burden in a disability termination case of proving that he is currently disabled. But the court held that because the claimant previously was found to be disabled, she was entitled to a presumption that her condition had not changed. Accordingly, the court concluded that the Secretary must rebut that presumption by producing evidence of improvement in the claimant's medical condition. The court did not cite any provisions of the Social Security Act as mandating such a presumption; the court instead relied on its own view of appropriate evidentiary burdens. 669 F.2d at 586-587.

On August 20, 1980—subsequent to the administrative proceedings in which the individual claimants in *Finne-*

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[6] "E.R." refers to the Excerpts of Record filed in the court of appeals.

gan and *Patti* were found not to be disabled, but before the Ninth Circuit rendered its decisions in those cases—the Social Security disability regulations were revised to make clear that an individual's disability would be found to have ceased when current evidence shows that he does not meet the statutory definition of disability. The regulations stressed that it was not necessary for the Secretary to find actual improvement in the individual's medical condition. 45 Fed. Reg. 55566 (1980). See 20 C.F.R. 404.1579, 404.1586, 404.1594, 416.994. See also Social Security Ruling (SSR) 81-6, reproduced at App., *infra*, 92a-93a.

The Secretary's new regulations were not invalidated or even cited by the Ninth Circuit in *Finnegan* and *Patti*. Accordingly, although the Secretary of course complied with the judgments in *Finnegan* and *Patti* by restoring benefits to the particular individuals involved in those cases, the Secretary published rulings stating that the decisions in *Finnegan* and *Patti* would not be followed in administrative cases concerning other claimants. See SSR 82-10c and SSR 82-49c, reproduced at App., *infra*, 87a-91a. With regard to *Finnegan*, SSA explained that many grandfatherees had been on the state rolls for years prior to their conversion to the SSI program and that the evidence on which they had been found eligible might not be available. SSA reasoned that in such circumstances it "could not possibly prove either 'material improvement' or 'clear and specific error' in the prior State determination" and that it therefore was appropriate to focus on current evidence of the claimant's condition (App., *infra*, 88a). With regard to *Patti*, SSA explained that the final administrative decision under review by the Ninth Circuit in that case had been rendered prior to issuance of the new regulations in August 1980, "so that the court's decision in *Patti* was based on an administrative decision involving regulations no longer in effect" (App., *infra*, 90a). "For these reasons (and since there are other Court of Appeals decisions which do not require a showing of improvement to terminate

disability benefits)," SSA concluded that "*Patti* does not provide a judicial interpretation of the disability regulations which should be followed" in cases involving other claimants (*id.* at 91a).

2. The district court in the instant case certified a plaintiffs' class consisting of all persons who reside in the states comprising the Ninth Circuit and who "(a) receive or received Supplemental Security Income disability benefits or Social Security disability insurance benefits and have been or will be considered for termination after August 30, 1981, or (b) receive or received Supplemental Security Income disability benefits under the 'grandfather clause' of the Social Security Act, 42 U.S.C. § 1382c(a)(3)(E), and have been or will be considered for termination after August 25, 1980, such consideration being or having been for the asserted reason that the claimant's disability had ceased" (App., *infra*, 99a). The two dates were selected to be one year prior to the dates on which the court of appeals' decisions in *Patti* and *Finnegan*, respectively, became final, because the Secretary's regulations provide that she may reopen an administrative decision denying a claim for one year after that decision became final (App., *infra*, 82a nn. 8, 9; see 20 C.F.R. 404.988, 416.1488).

The district court found a probability that respondents would succeed on the merits of their argument that the Secretary's "nonacquiescence" in the Ninth Circuit's decisions in *Patti* and *Finnegan* violated due process and principles of separation of powers (App., *infra*, 78a-80a). The court therefore entered a "preliminary injunction" prohibiting the Secretary, in adjudicating claims of class members still actively pending on administrative review, from failing to follow *Patti* and *Finnegan* and from implementing the SSR adhering to her August 20, 1980 regulations (App., *infra*, 85a). In addition, in Paragraph 4(c) of its order, the court instructed the Secretary to notify each class member whose benefits had been terminated at any time after August 25, 1980 or August 30, 1981, as applicable, that he or she "may apply for

reinstatement of benefits if he or she believes that his or her medical condition has not improved following the granting of disability benefits" (App., *infra*, 86a). Upon receipt of such an application, the Secretary was required to reinstate the payment of benefits to the individual pending a review of his or her case under the medical improvement standard of *Patti* and *Finnegan* (*ibid.*).

3. The Secretary applied for a temporary stay of Paragraph 4(c) of the district court's order to delay the sending of the notices until the court of appeals had an opportunity to consider an application for a stay pending appeal. However, the court of appeals denied a temporary stay (App., *infra*, 67a-72a), and the Secretary sent notices on August 15, 1983 to 28,557 class members whose benefits had been terminated (*id.* at 52a).[7] The court of appeals subsequently denied the Secretary's application for a stay of Paragraph 4(c) pending appeal (App., *infra*, 47a-66a).

On September 9, 1983, however, Justice Rehnquist granted the Secretary's application for a stay of Paragraph 4(c) pending appeal, expressing serious doubts that the district court had jurisdiction over the claims of class members affected by Paragraph 4(c) or had authority to order the payment of benefits to them pending reopening and review of their cases. *Heckler* v. *Lopez* (*Lopez I*), No. A-145. The full Court then denied respondents' motion to vacate that stay. *Heckler* v. *Lopez* (*Lopez II*), No. A-145 (Oct. 11, 1983). Although Justice Stevens, joined by Justice Blackmun, dissented from the Court's order in other respects, he agreed that Justice Rehnquist had properly entered a stay insofar as Paragraph 4(c) applied to class members who had received administrative decisions denying their claims for benefits more than 60 days prior to the filing of this

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[7] See Affidavit (at ¶ 5) of Jean Hall Hinckley, Acting Deputy Associate Commissioner, Office of Disability, Social Security Administration, included as Attachment G to the Secretary's Application for a Stay Pending Certiorari filed in this Court on March 5, 1984.

suit on February 4, 1983 but who did not seek judicial review within that 60-day period. Justice Stevens observed that "[t]hese persons' right to seek administrative or judicial review of their termination decisions had expired, and they could obtain benefits only by requesting that the Secretary reopen their cases" (*id.*, slip op. 3 (Stevens, J., concurring and dissenting)). Justice Stevens concluded that, under this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977), "the District Court had no jurisdiction to review the Secretary's refusal to reopen these cases" and "should not have granted them relief" (*Lopez II*, slip op. 3). Justice Brennan, in a dissent joined by Justice Marshall, did not disagree with Justice Stevens' legal analysis; he instead would have left the preliminary injunction standing insofar as it applied to these class members based on the court of appeals' observation in denying a stay (App., *infra*, 64a) that the Secretary might have waived the 60-day requirement by failing to raise that issue in district court (*Lopez II*, slip op. 3 (Brennan, J., dissenting)).

3. In a decision rendered on February 22, 1984, the court of appeals substantially affirmed the district court's preliminary injunction (App., *infra*, 1a-45a). Justice Rehnquist and Justice Stevens had concluded in the proceedings on the stay that the Court should disregard respondents' characterization of their legal arguments as "constitutional" in nature. *Lopez I*, slip op. 8 (Rehnquist, Circuit Justice); *Lopez II*, slip op. 6 (Stevens, J., concurring and dissenting). The court of appeals disagreed, stating that respondents' arguments "may properly be treated as constitutional for purposes of the inquiry before us" (App., *infra*, 22a n.10). Against this background, the court rejected the Secretary's jurisdictional arguments and her contention that the district court was without authority to order the payment of benefits pending reopening and review of closed cases.

a. First, although Justice Stevens and Justice Blackmun had expressly concluded, and five other Justices had implicitly agreed, that the district court had no jurisdic-

tion over the claims of class members who had received binding decisions terminating their benefits more than 60 days before this suit was filed, the court of appeals held that respondents were likely to succeed on their contentions that the district court did have jurisdiction over these claims (App., *infra*, 29a-36a).[8] The court acknowledged, contrary to its observation in denying a stay pending appeal, that the Secretary in fact had raised the 60-day limitations issue in district court, and it also acknowledged that "[t]he traditional requirements for equitable tolling of a statute of limitations are not present here" (*id.* at 31a). But the court explained its affirmance of the preliminary injunction as to these class members by suggesting that the 60-day limitations period might not apply where constitutional issues are presented (*id.* at 31a-33a), that the 60-day period may be "waived" by a court over the Secretary's objection (*id.* at 33a-34a), and that running of the 60-day period might be "deemed tolled retroactively" for all class members beginning on the date on which any class representative first filed an administrative appeal (*id.* at 36a). The court further held that even if the district court was without authority to review the time-barred claims under 42 U.S.C. 405(g), it nevertheless could require the Secretary to reopen those claims through the exercise of mandamus jurisdiction under 28 U.S.C. 1361 (App., *infra*, 36a-38a).

b. With respect to other class members affected by Paragraph 4(c) of the district court's order, the court of appeals dispensed with the requirement that they exhaust their administrative remedies before seeking judicial review under 42 U.S.C. 405(g). Although the court did not dispute the Secretary's submission that many of these class members might have their benefits reinstated in the course of seeking further administrative review

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[8] Judge Boochever disagreed with the majority on this issue. He concluded, for the reasons given by Justice Stevens, that the district court had no jurisdiction under 42 U.S.C. 405(g) over such claims (App., *infra*, 44a-45a).

of the denial of their claims, the court nevertheless found jurisdiction on the basis of its conclusion that exhaustion would be futile with regard to a particular issue—whether the evidence should be reviewed under a medical improvement standard—that might be raised in the administrative proceedings (App., *infra*, 19a-22a). The court also excused exhaustion on the ground that the "constitutional" issues respondents raised were "collateral" to their substantive claims for benefits (*id.* at 22a-26a).

c. Finally, although Justice Rehnquist in granting a stay had expressed "serious doubt," which he believed would be shared by other Members of the Court, whether the district court's order requiring the payment of interim benefits was consistent with 42 U.S.C. 405(i) and this Court's decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (*Lopez I*, slip op. 6-7, 9), the court of appeals found this very argument to be "without merit" (App., *infra*, 39a). In the court's view, the ordering of interim benefits was simply an exercise of the district court's "traditional equitable power" and "equitable discretion" (*id.* at 40a, 41a) that was not barred by sovereign immunity (*id.* at 41a-42a).

d. The court of appeals did modify the preliminary injunction on the merits to eliminate relief for class members who had received a final decision terminating their benefits before the Ninth Circuit's decisions in *Finnegan* and *Patti* became final, because such claimants obviously could not argue that the Secretary was required by the Constitution to apply the reasoning of *Finnegan* and *Patti* in their cases (App., *infra*, 16a-18a). However, the court otherwise affirmed the preliminary injunction "in all respects" (*id.* at 44a). SSA estimates that there are 15,485 individuals who fall within the modified scope of Paragraph 4(c) of the district court's preliminary injunction. Affidavit ¶ 6, *supra*, note 7.

4. The Secretary then filed an application in this Court for a stay of the judgment of the court of appeals pending the filing and disposition of a petition for a writ of certiorari. By order dated April 30, 1984, the Court

denied the Secretary's request insofar as it applied to class members whose benefits were terminated on or after December 6, 1982—60 days before this class action was filed on February 4, 1983—or who completed the administrative appeal process on or after December 6, 1982. However, the Court granted the application for a stay insofar as it applied to all other respondents. *Heckler* v. *Lopez*, No. A-707.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision is flatly inconsistent with this Court's decisions concerning jurisdiction under the Social Security Act. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984); *Califano* v. *Sanders*, 430 U.S. 99 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). The massive and peremptory judicial intrusion into the Secretary's administration of the Act countenanced by the court below also threatens to make chaos of the "orderly administrative mechanism" established by the Social Security Act and implementing regulations for the processing of the millions of claims for benefits filed annually with the Social Security Administration. *Califano* v. *Sanders*, 430 U.S. at 102.

The most egregious error of the court of appeals was its affirmance of the district court's preliminary injunction ordering the Secretary to reopen thousands of administrative decisions terminating disability benefits that had become final and binding upon the claimants before this class action was filed. That aspect of the decision below is directly contrary to this Court's holding in *Califano* v. *Sanders*. The Court already has twice granted stays of this portion of the district court's preliminary injunction: first by the order of Justice Rehnquist on September 9, 1983 that subsequently was supported by six other Members of the Court, and again on April 30, 1984, when the Court unanimously granted a stay of the judgment of the court of appeals to this ex-

tent. We now ask the Court to summarily reverse this portion of the court of appeals' judgment.[9]

1. a. The court of appeals' conclusion that the district court properly ordered the Secretary to reopen adverse administrative decisions that had become binding upon the claimants prior to the filing of this suit is flatly inconsistent with this Court's unanimous decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977). In *Sanders*, the Social Security claimant had exhausted his administrative remedies and received an Appeals Council decision denying his application for disability benefits. After the 60-day period for seeking review of the Appeals Council decision had expired, the claimant sought to reopen that decision for the purpose of proving his eligibility for benefits. This Court held that 42 U.S.C. 405(g) did not authorize judicial review of the Secretary's denial of the request to reopen.

The Court noted that Section 405(g) "limits judicial review to a particular type of agency action, a 'final decision of the Secretary made after a hearing'" (430 U.S. at 108, quoting 42 U.S.C. 405(g)). The Court then explained that a petition to reopen a prior decision may be denied without a hearing as provided in 42 U.S.C. 405(b), and "[i]ndeed, the opportunity to reopen final decisions * * * [is] afforded by the Secretary's regulations and not by the Social Security Act" (430 U.S. at 108). The Court continued (*ibid.*):

> Moreover, an interpretation that would allow a claimant judicial review simply by filing—and being denied—a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in § 405(g), to impose a 60-day limitation upon judicial review of the Secretary's final decision on the

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[9] We believe that the court of appeals also clearly erred in affirming the district court's exercise of jurisdiction over the claims of other class members who had not exhausted their administrative remedies. See *Heckler* v. *Ringer, supra.* However, because of pending legislation and other factors, we have elected not to seek review on that issue at this time. See note 18, *infra.*

> initial claim for benefits. 20 C.F.R. § 404.951 (1976). Congress' determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims. Our duty, of course, is to respect that choice.

As we explain below, the court of appeals' decision in this case plainly does not "respect that choice."

b. In this petition, we challenge the judgment of the court of appeals insofar as it affirms the district court's exercise of jurisdiction over the claims of individuals who had received an adverse administrative decision and for whom the 60-day period within which to seek review of that decision had expired before this class action was filed on February 4, 1983. This group logically falls into two subgroups:

(i) The first subgroup is comprised of persons who fully exhausted their administrative remedies through the Appeals Council stage prior to the filing of this class action and thereby obtained a "final decision" of the Secretary, but failed to seek *judicial* review of that final decision within the 60-day period prescribed by Congress in 42 U.S.C. 405(g). This Court has made clear that the membership of a class in a class action brought under 42 U.S.C. 405(g) must be limited to individuals who personally satisfy the requirements for obtaining judicial review under that Section. *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979). Under *Califano* v. *Sanders*, the district court would not have had jurisdiction under 42 U.S.C. 405(g) to review the Secretary's final decision if an individual claimant had personally commenced an action for judicial review more than 60 days after that decision. It follows that the district court likewise did not have jurisdiction in this class action to grant relief to any individual if the commencement of the action on February 4, 1983 was more than 60 days after the Secretary's final decision denying his claim for benefits—*i.e.*, if the final decision was rendered before December 6, 1982. *Lopez II*, slip op. 3 (Stevens, J., concurring and dissenting).

(ii) The other subgroup at issue here is comprised of persons who, prior to the filing of this class action, had received an adverse administrative decision short of the Appeals Council stage but failed to seek further *administrative* review within 60 days. The failure of these individuals to seek further administrative review within that period is not addressed by 42 U.S.C. 405(g). However, 42 U.S.C. (Supp. V) 405(b) and 1383(c)(1) require a claimant to request an ALJ hearing within 60 days. In addition, the Secretary's regulations impose an identical 60-day time limit for seeking further administrative review at each step of the process and provide that the adverse decision will be binding upon the claimant unless he requests review within 60 days (or such further time as the Secretary allows in a particular case). See pages 4-6, *supra*. Those regulations must be sustained unless they exceed the Secretary's authority or are arbitrary and capricious. *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-8. They clearly do not suffer from either defect.

Regulatory provisions imposing time limits on each stage of the administrative process, and providing that an adverse decision at any level is binding on the claimant if he does not seek further review within the time allowed, have been in effect since 1940.[10] Such provisions also were in effect when Congress enacted the Title II disability program in 1954 and 1956[11] and the SSI program in 1972.[12] Congress's integration of the disability and SSI programs into this established administrative

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[10] 5 Fed. Reg. 4169, 4171-4174 (1940), adding 20 C.F.R. 403.706(c), 403.708(b), 403.708(g), 403.709(b), 403.709(*l*), 403.710(b), 403.710(e).

[11] Social Security Amendments of 1954, ch. 1206, § 106, 68 Stat. 1079; Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815. See 20 C.F.R. 403.706(c), 403.708(b), 403.708(g), 403.709(b), 403.709(*l*), 403.710(b), 403.710(e) (1954 and 1956).

[12] Social Security Amendments of 1972, Pub. L. No. 92-603, Tit. III, 86 Stat. 1465 *et seq.* See 20 C.F.R. 404.908, 404.911, 404.916, 404.918, 404.940, 404.946, 404.951 (1972).

framework must be viewed as a ratification of these existing procedural provisions and an expression of congressional intent that they should apply with full force to the disability and SSI programs. See *Haig* v. *Agee*, 453 U.S. 280, 297-299 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). The district court's order requiring the reopening of binding administrative decisions frustrates the clearly established policy of repose embodied in the Secretary's regulations.

Moreover, the individuals in this second subgroup not only failed to seek further administrative review of an adverse decision within 60 days; they also failed to seek judicial review within that period. As noted above (see pages 13-14, *supra*), the court of appeals held that it was not necessary for class members to exhaust their administrative remedies in order to seek judicial review of the Secretary's failure to apply a medical improvement standard in her on-going review of their claims. For the reasons stated in the margin, we believe that this holding was clearly incorrect.[13] But assuming arguendo that

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[13] A denial of a claim for benefits at the initial determination, reconsideration, or ALJ hearing stage is "interlocutory" (*Mathews* v. *Diaz*, 426 U.S. 67, 73 (1976)); it is not a "final decision" in the sense that it is an administrative "judgment" that terminates the proceedings, conclusively rejects the claim for benefits, and disposes of all issues having a bearing on the matter. Compare *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). Under the Secretary's regulations, only a decision by the Appeals Council terminates the administrative proceedings and represents the Secretary's final determination. See *Heckler* v. *Ringer*, slip op. 2-3 & n.2. The Court in *Salfi* held that a court may not dispense with the requirement that the claimant exhaust his administrative remedies through the Appeals Council stage based on its own assessment that exhaustion would be futile. 422 U.S. at 766. Exhaustion could not be regarded as futile here in any event because, as the court of appeals acknowledged (App., *infra*, 20a), class members might obtain payment on their claims for benefits in administrative proceedings even if a medical improvement standard is not applied, and the claim might be denied for reasons having nothing to do with that standard. *Heckler* v. *Ringer*, slip op. 14-16 & n.12. Even the dissenting Justices in *Ringer* agreed that exhaustion is required where,

the court of appeals properly dispensed with the exhaustion requirement, the class members necessarily would be subject to the 60-day limitation prescribed in 42 U.S.C. 405(g) if they attempted to obtain immediate judicial review. Because the class members in the second subgroup did not seek judicial review within 60 days, the district court plainly had no authority under *Califano* v. *Sanders* to review those decisions in this class action even if the court of appeals were correct in excusing full exhaustion of administrative remedies.

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as here, payment of the claim for benefits is not foreclosed at the administrative level. Slip op. 2, 12-13 (Stevens, J., dissenting).

The court of appeals erroneously focused not on the finality of the decision disposing of the claim for benefits, but on what it perceived to be the Secretary's position on one issue that might ultimately have a bearing on that decision—*i.e.*, whether the evidence should be reviewed under a medical improvement standard. But Section 405(g) does not provide for judicial review of the Secretary's position on "issues" as such; it provides for review only of final decisions on claims for benefits.

The court of appeals also thought that judicial review was available under 42 U.S.C. 405(g) because the issue regarding the application of the medical improvement standard required by *Patti* and *Finnegan* was "entirely collateral" to the substantive claim for benefits under *Mathews* v. *Eldridge*, 424 U.S. at 330-332. See App., *infra*, 22a-26a. But the evidentiary standards to be applied in reviewing a claim for benefits go to the very heart of the determination of the merits of the claim. Compare *Heckler* v. *Ringer*, slip op. 10-12, 14-15; *Lopez I*, slip op. 8-9 (Rehnquist, Circuit Justice). That issue is not rendered "collateral" merely because respondents contend that constitutional principles of separation of powers and due process require application of a particular evidentiary standard by virtue of the prior decisions in *Patti* and *Finnegan*. See *Heckler* v. *Ringer*, slip op. 14-15.

Nor have respondents made any showing of irreparable injury resulting from the Secretary's disposition of the assertedly "collateral" issue that is distinct from the injury that could result from any erroneous denial of benefits at a preliminary stage of the administrative process. See *Heckler* v. *Ringer*, slip op. 14-15; *Mathews* v. *Eldridge*, 424 U.S. at 331-332. Congress determined in establishing the administrative review mechanism that a retroactive award of benefits at a later date is an adequate statutory remedy for an erroneous denial of a claim for benefits at a preliminary stage of the review process. Cf. *Heckler* v. *Ringer*, slip op. 23-24.

c. The court of appeals' decision cannot be squared with *Califano* v. *Sanders* for another reason as well. In *Sanders*, the individual claimant actually had requested that SSA reopen the prior decision denying his claim for disability benefits (430 U.S. at 102-103). Here, by contrast, there is no indication that any of the thousands of class members who allowed the decision terminating his benefits to become binding before this suit was filed later requested the Secretary to reopen that decision. Even assuming that a district court would have jurisdiction to order the Secretary to reopen a prior decision, notwithstanding the contrary holding in *Califano* v. *Sanders*, at the very least the claimant would be required to file a request with the Secretary before asking a court to intervene. If the claimant did not do so, there would be no "decision" whatever by the Secretary on the reopening issue, much less a "final decision" that could be subject to judicial review under 42 U.S.C. 405(g). See *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. at 764; *Califano* v. *Yamasaki*, 442 U.S. at 704.

The district court's exercise of jurisdiction over these closed administrative cases instead was undertaken at the request of the handful of named plaintiffs in this case. However, the 20 individuals named as plaintiffs clearly have no standing to request that the Secretary or a court reopen a decision pertaining to *other* claimants who have not initiated the reopening process. In fact, the Secretary's regulations expressly provide that reopening may be requested only by a person who was a party to the prior decision. 20 C.F.R. 404.987, 416.1487. Similarly, 42 U.S.C. 405(g) provides that judicial review of a final decision of the Secretary is available only to an individual who was a "party" to the administrative hearing on the claim. See also 42 U.S.C. (Supp. V) 405(g) and 1383(c). *A fortiori* the 14 organizations that also were named as plaintiffs in district court have no standing to seek the reopening of prior decisions affecting individual claimants. The court of appeals' decision in this case therefore signals a wholly unwarranted

expansion of the scope of administrative and judicial review under the Social Security Act.

2. Notwithstanding this Court's decision in *Califano* v. *Sanders* and the view of seven Members of the Court in this very case that the district court had no jurisdiction over the claims of class members at issue here, the court of appeals held that respondents were likely to prevail on their argument that the district court did have jurisdiction over those claims (App., *infra*, 36a). The court of appeals offered three novel theories to support its erroneous conclusion.

a. The court of appeals first suggested that the 60-day limitation in 42 U.S.C. 405(g) for seeking judicial review does not apply where the claimant raises a constitutional issue (App., *infra*, 31a-33a). As an initial matter, it is doubtful that respondents' challenge to the sufficiency of the Secretary's evidentiary showings in disability termination cases is constitutional in nature. See *Lopez I*, slip op. 8-9 (Rehnquist, Circuit Justice); *Lopez II*, slip op. 6 (Stevens, J., concurring and dissenting). As we explain more fully in our Application for a Stay Pending Certiorari (at 14-17), filed on March 5, 1984, respondents' argument at bottom is simply an assertion of nonmutual collateral estoppel, which is not a constitutionally based doctrine (and which the Court unanimously refused to apply against the government in *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984)).

In any event, nothing in this Court's decisions supports the notion that the 60-day limit in 42 U.S.C. 405(g) is inapplicable in cases raising constitutional issues. To the contrary, in *Weinberger* v. *Salfi* the Court clearly indicated that the 60-day limit *did* apply to the constitutional question presented; the Court observed only that the Secretary had waived any objection on the ground by failing to raise it in district court. 422 U.S. at 763-764, citing Fed. R. Civ. P. 8(c). Moreover, the plain language of Section 405(g), which provides that an action for judicial review must be commenced within 60 days of "any" final decision of the Secretary, does not suggest an im-

plied exception for final decisions raising constitutional issues. Similarly, the second sentence of Section 405(h), which provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—*i.e.*, except as provided in Section 405(g)—would appear to require compliance in all instances with the time limitations prescribed in that Section.

The court of appeals also suggested that 60 days may not afford a constitutionally sufficient time within which to commence a civil action raising constitutional issues and that 42 U.S.C. 405(g) therefore should be construed to make the 60-day limit inapplicable in that setting in order to avoid a possible constitutional defect (App., *infra*, 32a-33a). This contention is without merit as well. The court of appeals cited no authority for the proposition that Congress may not insist upon enforcement of the generally applicable 60-day limitation in those cases in which the claimant may choose to raise a constitutional argument. Nor is there any reason to believe that the 60-day limit erects "an unduly burdensome procedural obstacle," as the court of appeals believed (App., *infra*, 33a). The claimant already has been involved in adjudicatory proceedings concerning his benefit claim; the 60-day period is simply a condition upon his continuing that adjudicatory process on judicial review. Furthermore, because judicial review under 42 U.S.C. 405(g) is based on the record already developed in the administrative proceedings, there is no need for the claimant to make a time-consuming factual investigation before filing his complaint in court.[14]

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[14] The court of appeals did not purport to find that the 60-day period was *actually* insufficient as applied to any of the individual named plaintiffs. And insofar as the unnamed class members are concerned, there is no indication that any were even contemplating seeking judicial review, much less that they intended to raise a constitutional argument.

Most importantly, however, if the 60-day period in fact proves to be insufficient in a particular case, Section 405 (g) and implementing regulations expressly allow the Secretary to extend that period. 20 C.F.R. 404.982, 416.1482. There is no indication that any of the class members requested such an extension. But the existence of that flexibility entirely undermines the court of appeals' contention that the 60-day limit in 42 U.S.C. 405 (g) raises constitutional difficulties as applied to cases raising constitutional issues.

The court of appeals asserted in addition that even if the 60-day period is adequate where constitutional issues are raised on judicial review following full exhaustion of administrative remedies, that period might be inadequate where such issues are raised in a case in which the court has excused full exhaustion (App., *infra*, 32a-33a). This argument is pure bootstrap: because the court of appeals chose to disregard the exhaustion of administrative remedies that is mandated by the Act, implementing regulations, and this Court's decisions (see note 13, *supra*), it also should disregard the statute of limitations. What is more, the court's analysis makes no sense: the view that the 60 days provided in 42 U.S.C. 405(g) is insufficient to marshal constitutional arguments is inconsistent with the court's holding that exhaustion should be excused because of the claimants' need to present the medical improvement and nonacquiescence issues to a court without delay.[15]

b. The court of appeals next suggested that the 60-day limitations period could be "waived" by a court even over the Secretary's objection because, in the court's

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[15] If the hypothetical claimants about whom the court of appeals speculated did not have time to prepare their constitutional arguments for presentation to the court, they could have continued to pursue their administrative remedies for the time being or requested an extension of time to file an action in court. In fact, of course, the claimants involved here did neither. The most reasonable inference is that they were prepared, for whatever reason, to allow the preliminary decisions terminating their benefits to become final and binding.

view, the Secretary has acted in bad faith in declining to follow *Patti* and *Finnegan*, and the interest in administrative efficiency therefore "should give way to the claimants' interest in adequately preparing their cases" for judicial review (App., *infra*, 33a-34a). This argument is seriously flawed in a number of respects. First, the court of appeals' assertion of bad faith on the part of the Secretary—unsupported by any evidence or findings to that effect—is wholly unwarranted and, in our view, fails to accord the respect due a coordinate Branch. The Secretary's response to *Patti* and *Finnegan* in light of the intervening regulations not addressed by those decisions (see pages 8-10, *supra*) in fact was entirely reasonable. Cf. *United States* v. *Morton*, No. 83-916 (June 19, 1984), slip op. 13-14 & n.21. Moreover, even if this Court ultimately were to sustain the court of appeals' view that the Secretary is required to follow the decisions of courts of appeals when reviewing claims filed by other persons, this Court's decisions in *United States* v. *Mendoza* and *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294-295 (1970), at the very least furnish a substantial basis on which the Secretary today can in good faith take a contrary view. By the same token, there is not the slightest indication that any of the thousands of individuals whose cases the district court ordered reopened were actually "preparing their cases" for litigation during the period prior to the filing of this class action, as the court of appeals speculated (App., *infra*, 34a). For all that appears, these individuals simply abandoned their claims altogether after receiving an adverse administrative decision.

Putting these considerations to one side, however, a court may not disregard the 60-day limitation Congress has prescribed in 42 U.S.C. 405(g) based on its own view of the relative equities of the Secretary's litigating position. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 407 (1917). "[T]he United States, as sovereign, 'is immune from suit save as it consents to be

sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 382, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). The requirement that an action for judicial review be commenced within 60 days is an explicit condition upon which Congress consented to suits under the Social Security Act (*Hunt* v. *Schweiker*, 685 F.2d 121 (4th Cir. 1983); see *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979)), and a court therefore has no authority to proceed where that condition has not been met.

c. Finally, the court of appeals asserted that even if the 60-day limitations period applied, it might be "deemed tolled retroactively" for all unnamed class members from the date on which any class representative first filed an administrative appeal. This is perhaps the most extraordinary of the court's many imaginative grounds for nullifying the 60-day limit Congress has prescribed, because it would result in a wholesale abandonment of the limitations period whenever a common question of law is present in a number of claims—a frequent occurrence in the administration of the Social Security Act. Section 405(g) furnishes no basis for judicial fashioning of such a tolling rule. To the contrary, its express provision for the Secretary to extend the filing period in appropriate circumstances strongly indicates that a court cannot fashion additional tolling principles that Congress has not authorized. *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). "Congress was entitled to assume that the limitations period it prescribed meant just that and no more." *Id.* at 276.[16]

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[16] The court of appeals' reliance on class action principles in Title VII cases (App., *infra*, 34a-36a) is wholly misplaced. Under Title VII, it is not necessary for each class member to file a charge

3. The court of appeals also held that even if the district court was barred from exercising jurisdiction under 42 U.S.C. 405(g) to order the reopening of time-barred claims, the court could accomplish precisely the same result simply by resorting to mandamus jurisdiction under 28 U.S.C. 1361. This holding, if accepted, would effectively nullify the limitations Congress deliberately prescribed in the special statutory review procedure it established. As we argued in *Heckler* v. *Ringer* (Pet. Br. 32-36; Pet. Reply Br. 16-20), Congress recognized as much in 1939, when it enacted 42 U.S.C. 405 and precluded such circumvention.

The second sentence of Section 205(h) of the Social Security Act, codified at 42 U.S.C. 405(h), provides that no decision of the Secretary shall be subject to review by any "tribunal * * * except as herein provided"—*i.e.*, except pursuant to 42 U.S.C. 405(g)—and the legislative history shows that Congress meant exactly what it said. S. Rep. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. 728, 76th Cong., 1st Sess. 43-44 (1939). This language bars review by a judicial tribunal in a mandamus action under 28 U.S.C. 1361 or by any other means except pursuant to 42 U.S.C. 405(g).

In addition, the third sentence of Section 205(h) of the Act, as enacted and still in effect, provides that "[n]o action" to recover on any claim arising under the Act shall be brought "under section 41 of title 28" of the United States Code.[17] This sentence also clearly precludes

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with the EEOC. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). Under the Social Security Act, on the other hand, each individual member of a class must file a claim for benefits. *Weinberger* v. *Salfi*, 422 U.S. at 764. When he does so, the time limitation and other requirements of the Act and implementing regulations apply to the ensuing administrative and judicial review of that individual claim and leave no room for the tolling notions the court of appeals advanced.

[17] In the 1976 edition of Title 42 of the United States Code, the phrase "under sections 1331 or 1346 of title 28" was substituted for "under section 41 of title 28." See 42 U.S.C. 405 note, at 518. The

the exercise of mandamus jurisdiction. As this Court observed in *Salfi*, "[a]t the time § 405(h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that title's grants of jurisdiction to United States district court, save for several special-purpose jurisdictional grants * * *" (422 U.S. at 756 n.3). In the 1948 recodification, these general grants of jurisdiction were carried forward en bloc in what is now Chapter 85 of Title 28, which, like its predecessor, is entitled: "District Courts; Jurisdiction." When Congress enacted the general grant of mandamus jurisdiction in 1962, it specified that the new mandamus provision was to be included in "chapter 85 of title 28 of the United States Code" (Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744). By this enactment, Congress deliberately placed 28 U.S.C. 1361 within the chapter that is the present-day codification of the prior Section 41 of Title 28. Congress thereby squarely placed mandamus actions under 28 U.S.C. 1361 among the suits that are barred by the "sweeping" preclusion of review in the third sentence of 42 U.S.C. 405(h). *Salfi*, 422 U.S. at 757.

In any event, even if the exercise of mandamus jurisdiction is not completely barred by 42 U.S.C. 405(h), mandamus relief nevertheless is available under 28 U.S.C. 1361 only if the plaintiff has no other adequate remedy and "only if the defendant owes him a clear nondiscretionary duty." *Heckler* v. *Ringer*, slip op. 13. The respondents whose claims are at issue here satisfy neither of these tests. They had a fully adequate remedy under 42 U.S.C. 405(g) but failed to pursue it within the time allowed. Moreover, the Secretary does not owe these respondents a clear nondiscretionary duty to reopen the prior decisions denying their claims for benefits. The Social Security Act itself does not even furnish a right

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codifiers' "choice, 'made * * * without the approval of Congress * * * should be given no weight.'" *North Dakota* v. *United States*, No. 81-773 (Mar. 7, 1983), slip op. 10 n.13, quoting *United States* v. *Welden*, 377 U.S. 95, 99 n.4 (1964).

to request reopening (*Califano* v. *Sanders*, 430 U.S. at 108), and the Secretary's decision whether to reopen is discretionary under her regulations. *Heckler* v. *Ringer*, slip op. 13.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the court of appeals should be reversed insofar as it affirms the application of Paragraph 4(c) of the district court's preliminary injunction to class members who received an adverse administrative decision prior to December 6, 1982, and did not seek further administrative or judicial review of that decision within 60 days.[18] The Court may wish to consider summary reversal.

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[18] Although we believe that the court of appeals erred in dispensing with the exhaustion requirement for other class members whose individual claims for benefits had not been denied in a binding fashion before this suit was filed (see note 13, *supra*), we have not sought review on that issue at this time. Both Houses of Congress have passed a bill that would institute a variant of a medical improvement standard in future disability cases and would also apply that new standard to cases pending on administrative review. See Section 101 of H.R. 3755, *supra*, as passed by the House of Representatives, and Section 2 of H.R. 3755, *supra*, as passed by the Senate, *supra*, note 5. The exhaustion issue therefore should not be of continuing importance in the medical improvement context. Moreover, in light of the Court's recent decision in *Heckler* v. *Ringer* reiterating the exhaustion principles enunciated in *Weinberger* v. *Salfi*, we are reluctant to ask the Court to address these issues once again before the lower courts have had an opportunity to apply the holding in *Ringer*. We note in this regard that the district court's order—despite its mandatory and sweeping character—is a preliminary injunction (App., *infra*, 2a, 48a, 78a, 83a n.10). The Secretary therefore remains free to request the district court to reconsider the exhaustion and jurisdictional issues in light of this Court's decision in *Ringer* should it be necessary to do so.

Respectfully submitted.

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